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Book Review. Handbook of the Conflict of Laws, 2nd ed. by Herbert F. Goodrich

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of the defendant in and of themselves constitute a generally recognized wrong," if so, we then proceed to inquire into possible defenses.

This is not only confusing but especially unnecessary in the restatement treatment of defamation since it includes a chapter on defenses. It should be noticed that fair comment and criticism are treated as defenses to defamation. This again is contrary to the traditional procedural development of the law of defamation. Fair comment is not defamation at all and the "defense" is available under a negative plea. Fair comment should be treated as a separate but related topic. The purpose of the restatement is not to amend the law but to state it as it is.

The chapter on Burden of Proof is not tort law and should have been omitted from a work already too large.

Usually violations of rights in the fields of Trade Regulation and Labor Relations are proper subjects for actions in Tort for damages, and the cases involving such matters rest upon a foundation of supposed substantive rights. But should a restatement of tort law undertake to include in such an ambitious way the whole matter of these two subjects, which are now so much subject to statute (particularly Federal statutes), and which to a considerable degree have been developed as a part of the expansion of equity jurisdiction?

One reading this volume and remembering the length to which it has run and comparing it with some of the other restatements cannot down the suspicion that it has been padded.

The Torts Restatement has not been made a concise workable statement of the great and essential fundamentals of that field of law, but a catch all for things which to be sure historically developed out of the actions of trespass and case, but today in their practical operation are so largely dealt with in other connections that it is an imposition to expect the lawyer who sets out to buy a book on torts to pay for the whole hodge-podge.

Much of the material on domestic relations is so largely concerned with the law usually treated in books devoted to domestic relations about which the writer knows so little that he hesitates to comment.

Finally I come to the expression of a dissatisfaction which I have felt throughout as to the comments. There is either too much or too little in this respect, to wit: in the comment and illustrations one encounters statements of the essential facts of many familiar cases. There are statements apparently of other real cases which I am unable to identify. I cannot but feel that the Bench would take more kindly to the restatement and use it more freely and extensively if these comments cited the cases whose facts are actually drawn upon and stated as illustrations. Caveat, (this being a favorite expression of the reporters in the restatement) I am not suggesting a mass of citations. This criticism is one which the writer has heard many persons make with respect to all the restatements, but this practice is evidently in pursuance of the considered policy of the American Law Institute.

Whether or not one agrees with the statements of rules in the restatements of torts, or any other subject, the fact remains that these restatements are becoming increasingly important. Although the restatements are not authority they are serving as sources for authority. Those who have their legal being in the jurisdictions where there are already several hundred volumes of reports, perhaps do not realize how often the courts of last resort in the newer states, when presented with a case of first impression, take down the appropriate restatement and apply and quote it rather than attempt to discriminate between the lines of reasoning employed by "conflicting authorities" in other jurisdictions, or trouble themselves to count noses in the effort to follow the "weight of authority."

For reasons such as this it is dreadfully important that a restatement should be well done. Has it been satisfactorily done in the third volume on torts?

LESTER W. FREEZER.*

HANDBOOK OF THE CONFLICT OF LAWS (Second Edition), by Herbert F. Goodrich.¹ St. Paul: West Publishing Co. 1938. Pp. xiv, 624. \$5.00.

"Goodrich on Conflict of Laws" has, since 1927, the date of publication of the

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first edition, become a familiar citation in opinions of courts and critical writings. Several generations of law students have found solace in its pages. Indeed, many law teachers, including the reviewer, have derived untold assistance from it. A new edition of so important a book deserves somewhat more than passing comment.

A good deal of water has gone over the Conflict of Laws dam since Dean Goodrich's first effort. The law magazines have carried many learned articles, there is more than the usual accumulation of case law, the Supreme Court has settled several important questions and unsettled as many others. The Restatement of Conflict of Laws has finally been permitted to see the light of day, and, what is quite as important, been subjected to the searching review of the learned world. On the whole, an highly complex area of the law is, in 1938, scarcely less chaotic than it was in 1927.

It cannot be said that Dean Goodrich, in his second edition, has materially reduced the chaos. One would expect, under the circumstances, that the author would revisit the premises on which his original structure had been based, and subject his postulates to critical reexamination. This, the dean seems not to have done. So far as concerns the doctrinal basis of the work, the second edition differs in no important particular from the first. Indeed, in neither edition has the author taken the pains clearly to set forth the terms of his thinking, although in both the implications are at once obvious.

Perhaps it is an injustice to charge that the author has not taken the "pains" to state and defend his premises. It is more accurate to state that he has not had the interest to do so. Obviously the author has very little concern over the raging controversy concerning the rational and legal basis of this branch of the law. Although seldom articulated, it is the so-called "vested right" theory that predominates throughout the book. It was good enough for the first edition and it is good

enough for the second. Moreover, the naive reader would hardly suspect that the theory has weaknesses that have been subjected to devastating attack. The reviewer is, on the whole, inclined to discount this inadequacy. After all, there are definite limits to what can be done in a small handbook. The weakness of all such enterprises, as the reviewer well knows, is the necessity for deceptive oversimplification. Nevertheless, such books are supposed to be of some value, and it is an impertinent criticism that the author of such a book has not transcended the obstacles which inhere in the character of the work itself.

Within the limits of what may be expected of a hornbook, the author has achieved satisfactory results in bringing up to date his original volume. There is, of course, a new chapter on Taxation. Important new decisions in other parts are noted and discussed. Recent periodical literature is canvassed on particular problems. The Restatement is cited frequently both in text and notes.

The troublesome problem of the *renvoi* is treated in a new section.² Probably no one should expect a satisfactory treatment of this matter in the type of book under review. The fact remains, however, that it does not receive satisfactory exposition. Nor does the problem of qualification fare better. The usual dogma gets a black letter in the case of the problems of substance or procedure.³ The "law of the forum" governs, subject to the limitations of the federal Constitution.⁴ Embarrassing cases like *Precourt v. Driscoll*⁵ and *Fitzpatrick v. International R. Co.*⁶ are not discussed.

The dean guessed wrong on the problem whether the principle of *res judicata* is applicable to a finding of domicile in divorce litigation. "Jurisdiction of a court over subject matter or status is probably always open to collateral attack," states the black letter,⁷ although it is followed by the qualification that there is "some authority" to the contrary. It

² Section 7.

³ Section 78. Cf. also Section 18 where it is said that "the forum will apply its own law to determine questions of domicile."

⁴ The constitutional difficulty appears in the

decision in *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178 (1936).

⁵ 85 N. H. 280, 157 Atl. 525 (1931).

⁶ 252 N. Y. 127, 169 N. E. 112 (1929).

⁷ Section 20.

could have been but a short time after the book went to press that the Supreme Court made the authority final.⁸

Conspicuous for its absence in the first edition was an adequate treatment of the many troublesome problems connected with powers of foreign corporations and the legal effect of their *ultra vires* acts. The second edition discloses no additional learning on this subject.

On the question of jurisdiction to annul a marriage, the author has shifted from his original position that jurisdiction to annul is "on principle, vested only in the courts of the state which determines the validity of the marriage"⁹ to the principle that such jurisdiction "is vested only in the courts of the domicile of the parties."¹⁰

Although the doctrine of *Swift v. Tyson*¹¹ was not mentioned in the first edition, the problem receives a section in the revised work. "Since 1842," we are told, "as a result of the well known decision of Mr. Justice Story in *Swift v. Tyson*, the federal courts have often applied a Conflict of Laws rule which differed from that of the courts of the state in which they sat. . . . Recently, the Supreme Court, by overruling *Swift v. Tyson*, has abolished this doctrine."¹² It is true, of course, that in many cases, federal courts have applied a Conflict of Laws rule that differed from that of the state in which they sat. It is also true, that in some cases, the federal courts declined to apply any Conflict of Laws rule at all, relying on *Swift v. Tyson* to enable them to apply the rule of decision as to the merits of the case, as determined by the federal courts. The effect of *Erie R. Co. v. Tompkins*,¹³ therefore, is considerably more far reaching than indicated by the author.

These criticisms, are mentioned because they seem to the writer to be exceptions to the prevailing excellency of the volume. It is the time honored function of a book review to elaborate trivial exceptions and treat them as if they were typical of the entire book. Among hornbooks, "Good-

rich on Conflict of Laws" will for many years, stand out as one of the best. The publishers have done justice to a good manuscript by maintaining their usual high standard of manufacture. One complaint seems pertinent. Many readers would be pleased if the dates of cases were included in the citations, a practice followed in some of the hornbooks. A table of cases and a reasonably adequate index conclude the volume.

FOWLER V. HARPER.*

THE CONTRACT CLAUSE OF THE CONSTITUTION, by Benjamin Fletcher Wright, Jr.¹ Cambridge: Harvard University Press. 1938. Pp. xvii, 287. \$3.50.

It is highly desirable that a review of any book take due account of the purposes for which it was written. The author's purpose has not been to write a text which lawyers might consult as an authoritative source of the law that has been judicially developed on the basis of the Contract Clause of the federal Constitution. He has aimed rather to treat that judicial process as an historical example of the inevitable problem of reconciling the security of private property with the existence of majority rule in a democratically conceived and organized government. The author has, accordingly, been particularly interested in portraying the forces that were operative in giving The Contract Clause the particular scope that it has had during the stages of its judicial development, and in giving the historical background for the struggles that were the inevitable incidents of that process. He has also stressed the economic significance of particular applications of that Clause, and the importance of those applications upon the problems of governmental adjustments of policy as new developments have produced changes in views as to the desirable extent of governmental interposition in the community's economic and social life. The test of the book is the extent to which the author has achieved these objectives.

⁸ Davis v. Davis, 59 S. Ct. 3 (1938).

⁹ Section 130 (first edition).

¹⁰ Section 131 (second edition).

¹¹ 41 U. S. 1 (1842).

¹² Section 12.

¹³ 304 U. S. 64 (1938).

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